

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 02-32586-DHW

Chapter 11

CENTRAL ALABAMA HOME HEALTH  
SERVICES, INC.,

Debtor.

CENTRAL ALABAMA HOME HEALTH  
SERVICES, INC.,

Plaintiff,

v.

Adv. Proc. No. 02-3123-DHW

TOMMY G. THOMPSON, Secretary of Health  
and Human Services,

Defendant.

**MEMORANDUM OF DECISION**

The debtor, Central Alabama Home Health Services, Inc., commenced this adversary proceeding seeking injunctive relief against Tommy G. Thompson, Secretary of the Department of Health and Human Services. The complaint includes a request for a preliminary injunction.

A hearing on the request was held October 21, 2002. Both parties waived the right to an evidentiary hearing and submitted the request to the court based on legal briefs and arguments of counsel.

For the following reasons, the court concludes that the request is due to be denied.

## **Facts**

The facts are not disputed. The debtor is a home healthcare business operating in seventeen counties in Alabama through four physical locations. The debtor employs approximately 88 employees and provides in-home healthcare to approximately 250 patients, many of whom live in rural areas. The debtor is a qualified Medicare service provider. The debtor derives over 95% of its revenue from Medicare reimbursements.

The debtor filed a petition under chapter 11 on August 23, 2002.

The Department of Health and Human Services has a claim for approximately \$4.2 million resulting from prepetition overpayments to the debtor. The claim comprises ten obligations. The debtor attempted to repay nine of the obligations prepetition through an extended repayment schedule. In the two years preceding bankruptcy, the debtor repaid approximately \$3.2 million in overpayment liability. The tenth obligation arises from a special lump sum disbursement to the debtor in the amount of \$1.2 million.

About a month after filing chapter 11, the debtor received notice that the Department would commence withholding 100% of all Medicare reimbursements payable to the debtor postpetition in an attempt to satisfy the debtor's prepetition obligations. The withholding has cost the debtor approximately \$300,000 to date.<sup>1</sup> The debtor does not have the funds to continue to operate with zero Medicare reimbursement.

The debtor filed the instant complaint to enjoin the Department from recovering the prepetition obligations from the current reimbursement payments. The debtor contends that (1) the withholding constitutes an impermissible setoff in violation of the automatic stay imposed by 11 U.S.C. § 362(a); (2) the current reimbursement payments are property of the estate subject to turnover under 11 U.S.C. § 542; and (3) the court has authority to enjoin recoupment under 11 U.S.C. § 105.

---

<sup>1</sup>The majority of this amount represents reimbursement for services performed postpetition. When the debtor filed chapter 11, the debtor had not yet been fully reimbursed for all prepetition services.

The debtor does not seek a judicial determination of the proper amount of the debtor's overpayment liability. The debtor has challenged a small percent of the overpayment liability administratively. The debtor does not seek to enjoin or otherwise modify the administrative process related to determination of the debtor's overpayment liability. The debtor seeks only to modify the timing of repayment.

### **Jurisdiction**

The bankruptcy court has jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

The Department contends that the bankruptcy court lacks jurisdiction to entertain the adversary proceeding because "there is a jurisdictional bar to any court's intervention in Medicare payment matters."<sup>2</sup>

However, the claims in the instant proceeding do not arise under the Medicare Act but solely under the Bankruptcy Code. 11 U.S.C. § 362 determines what actions are stayed as a result of the filing of a petition. 11 U.S.C. § 553 prescribes the permissible use of setoff in a bankruptcy case. 11 U.S.C. § 541 defines property of the estate. The debtor is not seeking in this court to adjudicate the *amount* of the debtor's liability under the Medicare Act. The debtor seeks only to prevent the immediate recovery of that liability from property of the estate in violation of the automatic stay.

The court finds persuasive the language of the Third Circuit Court of Appeals in *University Medical Center v. Sullivan (In re University Medical Center)*, 973 F.2d 1065 (3d Cir. 1992):

[A] finding that jurisdiction is proper in this case does not impinge upon [the] authority of the Secretary protected by [42 C.F.R.] section 405(h). Indeed, there is no danger of rendering the administrative review channel superfluous, for there is no system of administrative review in place to address the issues raised by [the debtor] in its adversary proceeding. Thus we agree with the Ninth Circuit that "where there is an independent basis for bankruptcy court jurisdiction, exhaustion of

---

<sup>2</sup> Department's Brief, p. 30.

administrative remedies pursuant to other jurisdictional statutes is not required.” This conclusion advances the congressionally-endorsed objective of “the effective and expeditious resolution of all matters connected to the bankruptcy estate.” *In re Town & Country Home Nursing Servs. Inc.*, 963 F.2d 1146, 1154 (9<sup>th</sup> Cir. 1991).

*University Medical*, 973 F.2d at 1073-74 (citations omitted).

### **Preliminary Injunction**

The debtor requests the court to issue a preliminary injunction to prevent the withholding pending a trial on the merits of this adversary proceeding. To obtain a preliminary injunction, the following four requirements must be met:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a showing that plaintiff will suffer irreparable injury if an injunction does not issue, (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendants, and (4) a showing that the public interest will not be disserved by grant of a preliminary injunction.

*Snook v. Trust Company of Georgia Bank of Savannah, N.A.*, 909 F.2d 480, 483 (11<sup>th</sup> Cir. 1990). The preliminary injunction is an “extraordinary and drastic remedy not to be granted unless the movant ‘clearly carries the burden of persuasion’ as to the four prerequisites.” *Id.* The burden of persuasion for each element remains at all times on the movant. *Id.*

The debtor has met its burden of proving only three of the four required elements.

The debtor has shown that it will suffer irreparable injury if an injunction does not issue. Without the injunction, the debtor will be unable to meet current expenses or continue to operate. As a result, 88 employees will lose their jobs, and 250 patients will be forced to find alternate medical care. The patients may suffer a disruption in medical care, and their health may be placed at risk. The “going concern” value of the debtor’s business will be reduced or eliminated.

The debtor has shown that the threatened injury to the debtor outweighs any harm that might result to the Department. The potential harm to the Department is "completely pecuniary, does not affect people's health and well-being, is less immediate in effect, and more easily corrected at a later date than the sudden termination of health care services to infirm, disabled, or poor people." *First American Health Care of Georgia, Inc. v. United States (In re First American Health Care of Georgia, Inc.)*, 208 B.R. 985 (Bankr. S.D. Ga. 1996), *vacated and superseded*, 1996 WL 282149 (Bankr. S.D. Ga. 1996). Though granting the injunction could potentially harm the Department by preventing the immediate (though partial) collection of the overpayment, the injunction could significantly enhance the Department's ultimate chances for full collection by allowing the debtor to continue to operate.

The debtor has also shown that the public interest will not be disserved by granting the requested preliminary injunction. To the contrary, granting the injunction would serve the public interest. The injunction would ensure continuity of medical service for 250 patients and continuity of employment for 88 employees. The injunction would preserve the business reorganization effort of the debtor. The Department argues that continued funding of this debtor would constitute an improper use of public funds. Though the public has an interest in the proper use of Medicare funds, the Department has not shown that future reimbursements to the debtor would necessarily result in more overpayment liability. In addition, the injunction would serve the interests of all creditors of the estate by enhancing their ultimate prospects for repayment.

However, the debtor has not proven a substantial likelihood of success on the merits. In order to prevail on the merits, the debtor must prove that the Department is not entitled to withhold the funds under either the equitable doctrines of setoff (as limited by 11 U.S.C. § 553) or recoupment.

A creditor's right to setoff is strictly construed in a bankruptcy proceeding because the right to setoff is contrary to the Bankruptcy Code's dominant theme of equal treatment of creditors, because a setoff has the effect of paying one creditor more than another.<sup>3</sup>

---

<sup>3</sup> *Charter Crude Oil Co. v. Exxon Co. (In re The Charter Co.)*, 103 B.R. 302, 305 (M.D. Fla. 1989).

11 U.S.C. § 553 does not create a creditor's right to setoff.<sup>4</sup> The Code merely *preserves* the right to setoff if (1) both debts arose prepetition and (2) the debts are mutual.<sup>5</sup>

The debtor contends that the withholding constitutes an impermissible use of setoff because the Department is offsetting the debtor's prepetition debt against the Department's postpetition reimbursement liability.

The Department, on the other hand, argues that the withholding does not constitute setoff at all but instead the permissible use of recoupment.

Recoupment is the right of a defendant, in the same action, to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract. It means a deduction from a money claim whereby cross demands arising out of the same transaction are allowed to compensate one another, the balance only to be recovered.

20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* § 1 (1965).

A creditor's right to recoupment is narrowly construed in a bankruptcy proceeding because "recoupment works a preference that the Code does not expressly sanction or regulate." 1 David G. Epstein, et al., *Bankruptcy* § 6-45, at 706 (1992).

---

<sup>4</sup>With certain exceptions, the Bankruptcy Code "*does not affect* any right of a creditor to offset a mutual debt." 11 U.S.C. § 553(a) (emphasis added).

<sup>5</sup>Under Alabama law, the debts are mutual if the debts are "due from one party to the other in the same right." *B. F. Goodrich Employees Federal Credit Union v. Patterson (In re Patterson)*, 967 F.2d 505, 509 (11<sup>th</sup> Cir. 1992) (quoting *King v. Porter*, 230 Ala. 112, 116, 160 So. 101 (1935) and citing *First Nat'l Bank of Abbeville v. Capps*, 208 Ala. 207, 94 So.109 (1922)). The "debts must be in the same right and between the same parties, standing in the same capacity." 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 553.04, at 553-22 (15<sup>th</sup> ed. 1993).

“Crucial to successful recoupment is the requirement that the subject matter of the plea of recoupment must arise out of the same transaction upon which the plaintiff’s claim is based.”<sup>6</sup> A comparison of recoupment with setoff is useful:

Both of these common law doctrines permit parties to net their cross obligations. The difference between them is that setoff involves mutual debts arising from *unrelated transactions* and recoupment covers reciprocal obligations arising out of the *same transaction*. This difference prompts differing justifications of the two doctrines. Setoff recognizes that both parties are obligated to each other and allows offsetting these obligations for the sake of convenience. Recoupment, on the other hand, because it is based on claims from the same transaction, “is essentially a defense to the debtor’s claim.”

1 David G. Epstein, et al., *Bankruptcy* § 6-45, at 703 (1992) (footnotes omitted).

Therefore, the issue before the court is whether the claims of the debtor and the Department arise out of the same transaction.<sup>7</sup>

At least two Circuit Courts of Appeal have addressed the issue. See *United States v. Consumer Health Services of America, Inc.*, 108 F.3d 390 (D.C. Cir. 1997) and *University Medical Center v. Sullivan (In re University Medical Center)*, 973 F.2d 1065 (1992).

The reasoning of the District of Columbia Court of Appeals in concluding that the debts of the debtor and the Department arise out of the same transaction is persuasive. The court relied heavily on the language of the Medicare statute which determine’s the amount of the Secretary’s liability to health care providers:

---

<sup>6</sup>*Perdido Pass Restaurant v. Sunbelt Vacation Travel, Inc. (In re Sunbelt Vacation Travel, Inc.)*, 94 B.R. 715, 719 (Bankr. S.D. Ala. 1988).

<sup>7</sup>The debtor has pointed to many factual aspects of the relationship between the parties to support its contention that the debts arise out of separate transactions. For instance, the overpayments arise out of nine different audit periods. The parties have treated the overpayments separately in fashioning repayment schedules with varying rates of interest and amortization periods.

The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) . . . the amounts so determined, *with necessary adjustments on account of previously made overpayments or underpayments* . . .

42 U.S.C. § 1395g(a). In other words, the Secretary's liability to the debtor is by statute defined to exclude the amount of previous overpayments. The District of Columbia Circuit Court of Appeals stated:

To conclude otherwise, we think, would allow the Bankruptcy Code to modify an explicit statutory scheme defining liability for particular services. Neither . . . [of the parties] has offered authority for the proposition that the Bankruptcy Code can act to override an explicit statutory limitation on what the government owes for a particular service.

*Consumer Health Services*, 108 F.3d 394-95. The court concluded that the statute was the "key"<sup>8</sup> to determining whether the debts arose from the same transaction:

Since it requires the Secretary to take into account prepetition overpayments in order to calculate a postpetition claim . . . Congress rather clearly indicated that it wanted a provider's stream of services to be considered one transaction for purposes of any claim the government would have against the provider.

*Id.* at 395. As stated above, the court finds the reasoning persuasive. The debtor has not proved a substantial likelihood of prevailing on this issue. If the debts arose from the same transaction, the Department is permitted to recoup the overpayment from the current reimbursement payments to the debtor.<sup>9</sup>

---

<sup>8</sup> *Id.* at 395.

<sup>9</sup>The amount to be withheld is left to the sole discretion of the Secretary, and the court has no authority to interfere with the amount of the payments under the statute absent the exhaustion of all administrative remedies.

The debtor further argues that the bankruptcy court, as a court of equity, may modify the doctrine of equitable recoupment under the authority of 11 U.S.C. § 105. The court has been offered no authority to support this contention and is aware of none.

The court therefore concludes that, because the debtor has not proven a substantial likelihood of success on the merits, the preliminary injunction is due to be denied.

Done this 23 day of October, 2002.

/s/ Dwight H. Williams, Jr.  
United States Bankruptcy Judge

c: Robert L. Shields, III, Attorney for Plaintiff  
Patricia A. Conover, Attorney for United States  
Greg Bongiovanni, Attorney for United States